Simmons Company *and* Midwest Regional Joint Board, Amalgamated Clothing and Textile Workers Union, AFL–CIO–CLC. Cases 30–CA–11635 and 30–CA–11959–2

August 15, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On August 5, 1993, Administrative Law Judge Michael O. Miller issued the attached decision. The General Counsel filed exceptions, and a brief in support, and the Charging Party filed exceptions, adopting the General Counsel's brief. The Respondent filed cross-exceptions and a brief in support, and a brief in answer to the General Counsel's and the Charging Party's exceptions. The General Counsel filed a brief in answer to the Respondent's cross-exceptions and a brief in reply to the Respondent's answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions except as modified and to adopt the recommended Order.

We agree with the judge that the Respondent did not violate Section 8(a)(3) and (1) of the National Labor Relations Act by: issuing warnings to employee Florin on December 3, 1991, January 15, 1992, April 29, 1992, and March 12, 1993; laying off Florin in December 1992. We find, however, contrary to the judge, that the General Counsel made a prima facie showing that these actions violated Section 8(a)(3) but we also find that this showing was successfully rebutted by the Respondent.[2]

As more fully discussed in the judge's decision, the Union conducted an organizational drive in 1991. Employee Jennifer Florin served on the organizing committee. Certain aspects regarding the creation and management of the employee stock ownership plan (ESOP) became issues in the Union's campaign. The Union lost the election held on April 25, 1991.[3] On November 6, 1991, Florin became a named plaintiff in a class action suit regarding the ESOP.[4] On November 15, 1991, plant General Manager Saliture, a named defendant in the suit, addressed the plant's employees. In the speech he linked Florin and the Union to the suit and stated that the Respondent felt that the suit was an attack on the Company, stated that the employees did not have to participate in the suit, and launched a verbal attack on the Union. On December 16, 1991, the plaintiffs in the suit filed a motion for an order prohibiting the defendants from engaging in unsupervised communications with class members regarding the suit. An affidavit, signed by Florin, was attached to the motion. The motion was granted January 16, 1992. On March 31, 1993, the Court approved a settlement of the suit.

Saliture's November 15, 1991 speech is sufficient to establish that the Respondent perceived the filing of the lawsuit as union activity, and that it was aware of Florin's role in the lawsuit. The speech also established that the Respondent had animus towards the Union in general as well as specifically towards the filing of the lawsuit and towards Florin. The issuance of the warnings to Florin and her December 1992 layoff all occurred while the lawsuit was pending. Therefore, the timing of these adverse actions against Florin and Saliture's November 15, 1991 speech support the inference that Florin's role in the lawsuit was a motivating factor in the decisions to issue the warnings and to effect the layoff.

The judge, however, implicitly credited supervisor Waldhart's explanations as to the reasons the first three warnings were issued to Florin. He noted that Florin did not dispute the assertions of her mistakes and misconduct contained in those warnings. The judge found that the Respondent had established that these warnings were sufficiently similar to other warnings issued both to Florin and to other employees to establish that there was no disparate treatment in the issuance of these warnings. We agree.

The March 12, 1993, warning was for an incident that occurred on March 11. Florin had complained to supervisor Waldhart that employee Walquist, who operated the same machine as Florin on the second shift, had changed Florin's markings on the machine. In

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F. 2d 899 (1st Cir. 1989).

We find no prima facie case that Respondent unlawfully caused Florin's earnings to decrease. Although, as discussed below, animus was established through the speech of the plant's general manager, Saliture on November 15, 1991, we conclude that the General Counsel failed to establish that any action or actions on the part of the Respondent caused the decline in Florin's earnings between 1991 and 1992. Thus, there is insufficient evidence to support an inference that the decline violated Sec. 8(a)(3).

[3] Objections to the election were filed. In a decision issued May 28, 1993, the Board found that on April 23, 1991, the Respondent's then vice president, Saliture, made a speech to the employees in which he conveyed to them ''the futility of their choosing the Union as their bargaining agent and the inevitable loss of jobs if they made such a choice.'' The Board concluded that the speech constituted objectionable conduct and set aside the election. *Simmons Co.*, 30–RC–5233 (not reported in bound volumes).

[4] The other named plaintiff was a former Simmons employee.

making the complaint, Florin spoke in a loud voice and stated that she had been running the ''fucking machine'' for 4 years and that no one was going to change it without consulting her. We agree with the judge that the warning was the outgrowth of a series of incidents between Florin and Walquist for which Florin had already been warned. The judge found that the warning was issued primarily for ''backlashing'' Walquist and secondarily for the manner in which she communicated her complaint to Waldhart.[5] We conclude that the Respondent's evidence is sufficient to rebut the General Counsel's prima facie case as to this warning, and shows that the warning would have been given even without Florin's protected activity.

Concerning the December 1992 layoff, the quilting work was slow and Florin and another employee in the department were doing ''make work.'' After determining that a layoff is necessary within a department, the Respondent's practice, which it followed here, is to solicit employees for a voluntary layoff. If there are no volunteers, all other things being equal, the least senior employee, in this case Florin, is laid off. Florin declined an offer of work, in lieu of layoff, on another shift in the quilt department as a replacement for a more senior employee who had volunteered for layoff. Florin also declined an opportunity, again in lieu of layoff, to bump a temporary employee from a less desirable job. In these circumstances, we conclude that the Respondent has rebutted the General Counsel's prima facie case that Florin's layoff was discriminatorily motivated in violation of Section 8(a)(3) and (1).

Accordingly, we adopt the judge's recommended Order dismissing the complaint.

ORDER

The National Labor Relations Boards adopts the recommended Order of the administrative law judge and the complaint is dismissed.

[5] We also agree with the judge that the manner in which Florin complained, in and of itself, would not have justified the warning, as other employees have used similar language, which members of management had heard, without being disciplined.

Paul Bosanac, Esq., for the General Counsel.
Townsell G. Marshall, Esq., and *Charles W. Brown. Esq. (Constangy, Brooks & Smith)*, for the Respondent.
Patrick Cronin, Director of Organizing, on behalf of the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was tried in Janesville, Wisconsin, on April 19 through 22, 1993, based on unfair labor practice charges filed on January 13 and December 24, 1992, as amended, by Midwest Regional Joint Board, Amalgamated Clothing and Textile Workers Union, AFL–CIO–CLC (the Union), and complaints issued by the Regional Director for Region 30 of the National Labor Relations Board (the Board), on June 30, 1992, and March 11, 1993, as amended and consolidated. The consolidated complaint alleges that Simmons Company (Simmons or Respondent) discriminated against its employee, Jennifer Florin, by harassing her, by more closely scrutinizing her work, by issuing her warnings and reprimands, and by laying her off because of her union or other protected concerted activity, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). Respondent's timely filed answers deny the commission of any unfair labor practices.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. THE EMPLOYER'S BUSINESS AND THE UNION'S LABOR ORGANIZATION STATUS

Preliminary Conclusions of Law

Respondent is a corporation with a plant and office located in Janesville, Wisconsin, where it is engaged in the manufacture and nonretail sale of mattresses and related items. In the course and conduct of its business operations during the 12-month period ending February 29, 1992, it purchased and received goods and materials at its Janesville plant valued in excess of $50,000 directly from points located outside the State of Wisconsin. The complaint alleges, Respondent admits, and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondent admits, and I find and conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Janesville, Wisconsin plant is one of 15 Simmons manufacturing facilities nationwide. At the time of this hearing, there were about 111 employees working on 2 shifts. They were not represented by any labor organization.

The general manager of the Janesville plant is Anthony Saliture; Robert Bentley is the operations manager. James Witt was the human resources director until June 1992; he was replaced by Carmen Harstad. Charles Waldhart is the supervisor over the quilt and receiving departments. Robert Barton is senior vice president for human resources. These individuals are all statutory supervisors. The alleged discriminatee is Jennifer Florin, a first-shift quilt operator.

[1] All rulings made at the hearing are affirmed. The record includes a stipulation of oral testimony entered into by counsel. The stipulation is in lieu of certain pages of the record which were inadvertently and inexplicably lost; counsel averted substantial delay, inconvenience, and expense by reaching this stipulation and I appreciate their cooperation.

B. *Union Activity*

The Union commenced an organizational drive in early 1991, the only such activity faced by Respondent in at least 5 years. Among the employees active in that campaign was Jennifer Florin. She served on the Union's in-plant organizing committee, signed flyers and other literature, distributed union literature outside the plant, wore union buttons or insignia, and posted a union sticker near her machine. Her supervisor, Waldhart, observed the sticker and instructed her to take it down. Barton acknowledged that he knew which employees were on the Union's organizing committee.

A representation petition (Case 30–RC–5233) was filed on February 26, 1991. The Union failed to secure a majority of votes in the election which was conducted on April 25, 1991. Objections to the conduct of that election were filed by both parties and a hearing was held in September 1991, at which Florin testified on behalf of the Union. The hearing officer recommended that one union-filed objection be sustained and others dismissed. His report was pending before the Board at the time of this hearing.

C. *ESOP Activity*

In 1986, a group of Simmons managers (including Saliture and Barton) and Wesray Capitol Corporation, a leveraged buyout ''boutique'' headed by former Secretary of the Treasury William E. Simon, purchased Simmons from Wickes Corp. for $120 million. In 1989, they created an employee stock ownership plan (ESOP), with at least some of them remaining as the administrators of that plan, and sold about 11 million shares of Simmons to the ESOP for $241 million ($20 per share). At the time of the sale, that stock was independently appraised at $4.10 per share.[2] The purchase was entirely financed with debt; neither the employees nor their retirement plans were required to contribute. However, as the ESOP was intended to be the basis for the retirement plans in the future, Simmons ceased to make further contributions to those plans.[3]

The ESOP became a significant issue in the union campaign. In flyers and bulletins, as well as at meetings, the Union and its organizing committee, including Florin, charged that that the employees had been denied any role in the ESOP decision, that that deal burdened the Company with debt, weakening it, and had severely disadvantaged the employees by depriving them of employer contributions to their pension plan.

As a member of the Union's organizing committee, Florin signed and distributed flyers asserting the concerns about the ESOP. Along with others, she also signed a letter to the plan's administrators requesting information about the plan; the return address on that letter was the Janesville Labor Temple. The Employer (not the ESOP administrators) responded, insisting that any such request be made by individual participants or beneficiaries. At one point, Florin wore a union-sponsored shirt which listed the managers involved in the ESOP and their alleged profits. Saliture saw her and commented that the amounts were wrong.

On November 6, 1991, Florin became a named plaintiff in a class action suit against the ESOP administrators and other Simmons managers and officers who had sold stock to the plan, including Saliture and Barton, Wesray Capital, and Simon. She did so at the suggestion of the Union's attorneys. The complaint (Civil Action No. 91C-0948-S) was filed in the United States District Court for the Western District of Wisconsin. It was brought on behalf of the named plaintiffs (Florin and Alan L. Mundt, a retired Simmons employee) and ''all others similarly situated.'' The complaint defined the class as all those, other than the defendants, who were beneficiaries or participants in the Simmons ESOP. It alleged that the defendants, including Barton as both a plan administrator and seller of stock and Saliture as a seller of stock, breached their fiduciary duties, engaged in conflicts of interest, excluded the plan's employee beneficiaries from participating in the decisions respecting the acquisition of the stock, and violated the Employee Retirement Income Security Act [ERISA], 29 U.S.C. § 1001 et seq., in various respects. It sought return of all profits made by the defendants to the plaintiffs and other class members.

On November 15, 1991, Saliture addressed the Janesville employees on the subject of the ESOP lawsuit. In that talk, he referred to Florin as one of those who had filed the suit and pointed out that while Simmons Company was not named as a defendant, it was contractually obligated to pay the costs of defending the suit for the ESOP trustee and those of its managers named as defendants. He went on:

> I'm sure you can understand why Simmons Company feels that this lawsuit is an attack on the Company and part of a continuing effort by the Amalgamated Clothing and Textile Workers Union to drive a wedge between the employees and management at Simmons. The Company further believes that this lawsuit amounts to nothing more than a vendetta against Simmons Company by the union because we beat them so badly in the election at Janesville this year. They couldn't beat the Company in the election, so they are now suing some of its managers . . . the Union spent a ton of money trying to get in our Janesville plant. They tried to create distrust among our employees over the E.S.O.P. issue. You sent them a resounding message that you did not believe them and they were not wanted. I told you they were losers. Now it is clear that they are poor losers. . . . Simmons will never stand by and let this union destroy our relationship or our Company.
>
> Let's keep moving forward together and leave this union in the dust behind us.

At the conclusion of his speech, Saliture passed out copies and stated, ''Make sure Jennifer gets two copies, one for her and one for her lawyer, Damon Silvers.'' Saliture had referred to Silvers as the Union's ESOP spokesman in his speech.

On November 21, 1991, Saliture was quoted in an article in the Janesville Gazette, blaming the Union for the class ac-

[2] Share value dropped to a low of 50 cents in January 1991 but recovered to $1.42 in March of that year when Merrill Lynch Capital Partners acquired a substantial stake in Simmons, at that price. That acquisition reduced the shares held by the ESOP and the managers.

[3] Information concerning these financial machinations is drawn from uncontradicted and undisputed documents in the record, including a Business Week magazine article distributed to the employees by Saliture, a Janesville area newspaper article which had been posted by the Employer, and pleadings from the ESOP lawsuit, discussed infra.

tion suit, claiming that it was ''union-motivated because they lost the election,'' and defending the sale to the ESOP. In that article, he is further quoted as referring to prior organizational campaigns at the Janesville plant and boasting that ''I beat the Teamsters 3 to 1 and I beat the UAW 2 to 1. . . . Now I've beaten the Textile Workers 2 to 1, but they won't let it go at that. They get this suit going . . . [the plant is better off without a union] because it gives us flexibility. . . . We don't have to worry about a strike.'' This article was posted in management's locked bulletin board.

In December, plaintiffs' counsel filed a motion for an order prohibiting the defendants from engaging in unsupervised communications about the suit with members of the class. Attached to the motion was Florin's affidavit. That motion was granted on January 16, 1992.

On March 31, 1993, the court approved a settlement of the class action suit. The settlement provided for the payment of a minimum of $12 million to the ESOP beneficiaries or into the ESOP accounts of the ESOP participants. It would appear from the announcement of that settlement, issued by Simmons Company on Simmons letterhead, that all ESOP participants, and not just those who had elected to join the class action, benefited from the settlement.

D. *Alleged Discrimination*

1. The quilt department generally

As of December 21, 1992, there were about 18 employees (counting Florin who was then on layoff) in the quilt department, including 6 quilters and 3 material handlers. They were under the supervision of Charles Waldhart. Employees bid into these positions and, when they complete their training periods, assume them with their original seniority. At relevant times, Florin had the lowest seniority among the quilters.[4] There is a practice within the quilt department that a senior operator who runs out of work may bump a junior operator who has 2 or more hours of work remaining on his or her machine.

The quilt department is at the beginning of the production process, preparing the panels which are the outer covering of the mattresses. They are assembled from an outer layer of material, filler, and backing. These are cut and quilted together on machines which stitch various patterns on the product.

There are five quilting machines. On the day shift, number 1, operated by Judy Jass, runs the borders. Number 2 is operated regularly by Alice Markee. Numbers 3 and 4 are high-speed machines, known as 4300s, run by George Garber and Bob Anderson, respectively. Garber has run number 3 since it was installed in early 1992. Number 4 was installed in March 1993. The fifth machine, which operates at speeds between that of numbers 1 and 2 and the 4300s, is the machine regularly operated by Florin. That machine is run by Mark Walquist on the second shift.

The quilting machines can run different sizes and patterns. The operators are given quilt cards which tell them which panels to run and the number required. Each quilt card requires a changeover, with different materials to be run through the quilter and different needle patterns and cams. The employees work on an incentive, being paid for each panel. The incentive standard includes such down time as is required by needle breaks and cutter sharpening. The operators are separately compensated for each quilt card in order to even out the earnings of an operator who is assigned shorter runs and has consequently more down time in changeovers.

Respondent does not produce its mattresses and boxsprings for inventory. It produces on a made-to-truckload system. Respondent has a computerized assignment system whereby the days' orders are assigned by a computer which has the parameters of each quilting machine (speed and available setups). The computer attempts to assign those orders in the most efficient fashion, assigning the longest runs to the fastest machines and in such a way as to avoid changeovers. Its assignments are not absolute, however. They are reviewed by Waldhart who adjusts them to take into account factors not programmed into the computer.[5]

The quilt cards are color coded for priorities. Red cards are to be done first, followed by yellow and green. Where time permits, red and yellow cards for the same panels may be combined to eliminate a changeover. The highest priority are ''hot beds,'' those pieces which, for one reason or another, must be completed that day, by noon or earlier.

2. Warnings and reprimands

Respondent follows a progressive disciplinary system, beginning with a verbal warning (which is actually given to the employee on a written form), followed by a verbal written warning, written reprimands, suspensions of varying lengths, and, ultimately if reluctantly, discharge.

The complaint alleges four reprimands and warnings, issued to Florin on and after December 3, 1991, as discriminatory. However, she had received some disciplinary warnings prior to that time.

Thus, on June 28, 1991, all six of the quilt operators, including Florin, were issued a verbal warning (in writing) regarding operator-caused quilt repairs. On August 2, 1991, Florin was issued a written verbal warning for failing to work up to her performance levels. It noted that she had produced only 80 yards of product in 5-1/2 hours. Waldhart's notation implies that she purposely held her production down because she had wanted to run a different machine and objected to a needle change. The form on which the warning issued has a printed line, ''These matters will be reviewed within ____ days.'' Waldhart had filled in the blank to state that it would be reviewed within 1 day. On August 22, 1991, Florin was issued a verbal reprimand and was called in to Witt's office for a counseling session because of a confrontation with Waldhart. At issue was her failure to follow his instructions to work on the hot beds first, to change over to those panels when he spoke to her about it, and the manner in which she reacted to his instructions. The memorandum of that counseling session indicates that she had become upset, screamed at Waldhart, and gestured with her hands in a way which he took as threatening. In the course of that counseling session, she accused Waldhart of harassing every-

[4] To the extent that G.C. Exh. 6 would indicate that two quilters were trainees, I must find that exhibit in error. Other records introduced by Respondent establish that they had earlier completed their training period. General Counsel does not appear to argue otherwise.

[5] The record is devoid of evidence that Waldhart altered those computer-based assignments to Florin's detriment.

one if they did not do things ''his way.'' Florin was advised that her conduct could be deemed insubordination, which was grounds for discharge, and that her disruptive behavior could jeopardize her continued employment.[6]

On December 3, 1991, Florin was issued a verbal written warning (the first alleged as discriminatory) for failing to check her setups before running her machine. It noted that she had run 11 panels in the wrong setup, resulting in scrap, and had previously been talked to about such mistakes on several occasions. Waldhart testified that he would not write up an employee for the first such infraction but only if the conduct was repeated. He acknowledged that other operators made mistakes with their setups; he was not asked and did not say if any others had done it repeatedly. The warning states that ''These matters will be reviewed on a daily basis.'' Waldhart admitted that this was the first time he had inserted ''on a daily basis'' on the form in lieu of giving a number of days within which a review would be made.[7]

Florin was laid off from December 30, 1991, to January 14, 1992. When she returned to work, Waldhart issued her a detailed written reprimand asserting that her production rate had fallen excessively in the week ending December 14 and that she had failed to follow his instructions respecting changeovers on December 26, 1991. Specifically, Waldhart's notes, attached to the warning, asserted that she had run at 113 percent of actual on December 9, 117 percent on December 10, had stretched out her workday on December 11 by claiming an unnecessary 1.5 hours of down time, put in a full 8 hours on December 12 by working 3.67 hours on her regular machine at 149 percent of actual and the remainder of the day on another machine (on which she had been cross-trained) at only a 102-percent rate. Waldhart noted that her quarterly average was 118 percent of actual and he concluded that ''It is obvious that she milked out quilter #6 as she finished her sch. in exactly 8 hrs.''

With respect to Friday, December 13, Waldhart's notes indicate that Florin worked 8 hours at only 98 percent of actual, ''which is way below her average.'' It further noted that she should have cleared her schedule but left 78 yards unfinished; that work was finished on December 16 in 1.5 hours.

Waldhart's conclusion, stated in those notes, was that Florin was:

> doing whatever it takes to work 8 hrs . . . causing other problems in the quilt area as we are trying to keep our manning to a minimum. On Thursday when she knew she could bump onto an easier machine, she hurried herself, then managed to stretch out her time on the other machine. On Friday, she either mis-judged her time, or as previously documented, she was trying to prove a point.

The notes indicate that Waldhart spoke with Florin on December 17. She blamed the short runs and high rate of changeovers for her falling productivity. He testified that, according to payroll, the other operators ran at or above their quarterly averages with the same kind of runs.

On a separate page, Waldhart noted that on December 26, he had directed Florin not to change the needle setting on her quilter but to switch over to another machine already set up with the different pattern, so as to avoid a problem on her machine. Reviewing her payroll record for that day, however, he found that she had claimed changeover time. He disallowed the changeover time and told her that he would not pay her for that changeover on December 27. She claimed it anyway, and he again crossed it out. When Waldhart called her into his office for this discussion, leadperson Sherri Thompson was present as a witness. Waldhart took this precaution because of his awareness that she was a plaintiff in the ESOP lawsuit.

Waldhart acknowledged that this was the first time he had issued such a detailed warning. He was reviewing her work on a daily basis, as he claimed he was doing with each of the employees.[8]

Florin did not contradict Waldhart's warning regarding her production in the week ending December 16. She had no independent memory of the December 26 and 27 incidents. However, she had made notes concerning those days. Those notes, while not made entirely contemporaneously with the events and somewhat self-serving, indicate that she had had some disagreements with Waldhart about which machines she should run and how much time she should be allowed to degrease her machine after a preventative maintenance.

On April 29, 1992, after talking to her several times, Waldhart issued Florin a written reprimand detailing errors on 3 different days. On April 13, she had run six panels with the wrong setup and on April 15 ran four more with the wrong cam or blade.[9] On April 22, one panel was destroyed because of a cutter malfunction; she failed to rerun it, necessitating that another operator do it. The warning noted that she had been verbally warned about her failure to check the setups in December.

Florin did not receive another warning until March 12, 1993. That warning stemmed from an incident on the previous day when Florin became upset because Walquist, the second-shift employee who operated the same machine that she did, had removed her markings. She complained to Waldhart. In stating her complaint, Florin screamed at Waldhart and stated as she walked away that she ''had been running the fucking machine for four years and no one was going to change it without consulting her.'' Waldhart told her that it was his responsibility to deal with the second-shift employee, not hers, and that he was not going to put up with that sort of language.

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[6] The first charge in this matter was filed on January 13, 1992; the warnings of August 2 and 22, 1991, were thus within the 10(b) limitations period. As noted, they were not alleged as discriminatory.

[7] It should be noted, in this regard, that Waldhart had only been the quilting department supervisor since early 1991.

[8] I find no inconsistency between his claim that he reviewed everyone's work on a daily basis and his subsequent statement that he ''went back to the days to try to figure out why her rate was as low as it was'' when he wrote up the warning after the week had been completed.

[9] Included in these four was one item involving only 3 (and apparently an additional 4) inches of scrap caused by the use of the wrong sized cutter. These would not be considered panels. Standing alone, that scrap would not have warranted a warning. However, it did not stand alone; it followed three other items involving more significant amounts of scrap caused by her failure to change cams. I note that it was Florin who recorded this as scrap, not Waldhart. Similarly insignificant is the fact that on the scrap record of April 14, where Florin had indicated that a problem with the cutter had caused four items of scrap, Waldhart had written ''These count.'' Florin was not disciplined for any errors on April 14.

The written warning recited management's view of the facts of the incident, noted that she had previously been talked to about ''back-lashing'' another employee, and stated that it was the supervisor's responsibility to deal with problems in the department, not hers. She was told, ''we expect a sane and rational attitude in all discussions about fellow employees or management. Your outbursts and disruption on the floor will not be tolerated.'' She was also told that management had decided to treat this as a lower level of violation and merely issue a written warning. However, suspension or discharge was threatened for further violations.

This was not the first time that management had discussed Florin's problems with Walquist with her. In September 1992, she met with Harstad in regard to Walquist's complaints that she was harassing him (by complaining about his work and changes he made on the machine they shared). She was told to take her complaints to Waldhart. Again in February 1993, Walquist complained to Bentley that Florin was harassing him.[10] Florin met with Bentley, Walquist, and Waldhart on February 26. At that time, Florin was told to pay attention to her own work, not that of others, and to cease her backlashing of other employees.

The Simmons Employee Handbook prohibits the use of profane or abusive language. According to Bentley, the prohibition of profane or abusive language is uniformly applied; employees sometimes swear in the plant, occasionally in loud voices. When this is heard by management, it is ''addressed.'' Where employees have become loud and emotional, they have not always received a warning but they have been told that their conduct is inappropriate and will not be tolerated, he said. Respondent introduced no warnings or other discipline issued for the use of profane or abusive language.

Foul language is sometimes heard in the Simmons plant but it appears to be less common than in many industrial settings. When Bentley spoke with the employees about dissension in the department, he was heard to say that he was tired of ''all this bullshit.'' Employee Dennis Ames claims that Bentley and Waldhart were present when he was ''ranting and raving'' about the operation of his machine, swearing at it. He also testified that he had heard Waldhart use the infamous ''F'' word, saying that he, Waldhart, ''had fucked up.'' Susan Ball testified that she got upset during a meeting with Bentley over a dispute with the material handler, screamed and yelled, called him a liar, told him to get his ''head out of his ass.'' She also allegedly referred to the situation as ''bullshit.'' Bentley had no recollection of her swearing or calling him a liar. Neither Ames nor Ball was disciplined for their outbursts.

In another incident, Garber and material handler Dorn were arguing over whose responsibility it was to remove rolls of fabric. Waldhart described them as screaming at each other, ''almost fighting,'' when Garber called him over. Garber described the dispute to Waldhart and, according to Dorn, Waldhart threw the rolls of material into the aisle. Dorn claimed to have called Waldhart an ''asshole'' and, when he was told that he could not talk that way to the managers, said he did not ''give a shit'' what Waldhart thought, he was ''pissed off.'' Dorn received no written or verbal warning. However, Waldhart attempted to discuss the incident with him in his office. Dorn insisted on discussing it with Bentley instead. Waldhart denied that he heard Dorn use any foul language.[11]

Florin was not the only employee Waldhart disciplined. On February 6, 1991, he issued a verbal admonition to Pat Abbott respecting the quality of her work; it threatened further disciplinary action ''if the problem is not corrected. On August 21, 1991, he issued a written warning to Ava Bluer regarding the quality of her work. On December 16, 1991, he gave Alice Markee a ''written counseling'' and reprimand on the quality of her work. Mark Walquist was given a verbal warning on February 6, 1992, for misruns and repairs; that warning, like Florin's December 3, 1991 warning, concluded by stating that his performance would be reviewed on a daily basis. Alice Markee was given another written reprimand on February 10, 1992, for quality problems. George Garber received a verbal reprimand for failing to check his setups on February 19, 1992; it also provided that his work would be reviewed on a daily basis. Walquist was issued a written reprimand on February 20, 1992, for misruns and repairs.

3. The December 1992 layoff

November through February is Respondent's slowest season. Florin was laid off from December 30, 1991, through January 13, 1992, along with one or two other employees; no claim was made of discrimination with respect to that layoff.

In December 1992, Florin could see that a layoff was coming. She and Alice Markee had been cutting squares, a make-work job given them when the quilting work was slow, and had been told by Bentley that they could only cut so many squares. Bentley also observed that a layoff might be necessary. Daily orders and shipments were decreasing and there was not enough work to fully occupy the quilt operators at their machines; they were spending increasing amounts of their time on other functions. Waldhart had reported that he did not have enough work for all of his quilters.

Respondent conducts layoffs by department according to qualifications, experience, ability, and seniority. All other things being equal, seniority is determinative. Respondent also has a practice, when a layoff is required, of soliciting voluntary layoffs, starting with the most senior employee. When he determined that there should be a layoff among the quilters, Bentley instructed Waldhart to ask if any of the operators wanted to take a voluntary layoff. Walquist and Sue Ball volunteered. Ball's request, however, was rejected because she was a utility worker, one who filled in for workers in different jobs throughout the plant. She was not a quilter and did not work on Florin's job while Florin was on layoff.

[10] The accusations that Florin was harassing other employees did not originate with Respondent. They arose from complaints by Walquist. Respondent, it appears, took seriously any employee complaint of harassment, even when not based on sex or race. After the March 1993 warning, Bentley held a meeting of all of the operators to deal with the dissension between the first and second shift and between operators on the same shift.

[11] Given the factory environment, their lack of any motive to dissemble, and the nature of the arguments, I deem it likely that the employees used the language they claimed. I also deem it likely that use of such language during emotional outbursts was common enough to pass unnoticed.

Florin was asked if she wanted to fill in for Walquist on the second shift while he took the voluntary layoff. After consulting with her husband, she declined. Walquist's request for the voluntary layoff was denied because there was no one to replace him on the second shift. Florin was then offered the opportunity to bump a temporary employee in tip-off. She declined that as well and, as the least senior employee in quilting, was laid off on December 14, 1992. She remained on layoff until January 5, 1993, when the disability of another employee created an opening for her to return.

At the time of Florin's layoff, two other employees were already on layoff, one from boxspring taping and utility, since about November 2, 1992, and another from flat cut and sew, since November 17, 1992. Both apparently remained on layoff at least until the end of the year. One employee, Mark Schricker, was laid off on December 15, 1992, However, he was recalled at the beginning of the following week.

No other employees were laid off either in the weeks immediately preceding or following Florin's layoff. Bentley explained that there were no layoffs in boxsprings because of a retraining project. There were none in matt finish because of employees out on disability and none in contourflex because of changes in the product lines.

4. Loss of income

Most of Florin's earnings come from her incentive pay. In 1991, she earned nearly $28,000. In 1992, however, she earned only a little over $23,000, a decrease of 17 percent. In the same period, the earnings of the other quilt operators increased (but no figures were provided). Bentley could offer no explanation. Neither could Carolyn Mergens, Respondent's corporate industrial engineer coordinator. She testified that while it was not necessarily unusual for an employee's earnings to drop by as much as $4000 from one year to the next, she would conclude ''that something is definitely going on'' if the earnings of three out of four operators increased while those of the fourth decreased. She posited that there might have been a change in the amount of overtime or that an operator might be slowing down, taking longer to do the changeovers. She did not claim that either had happened here.

Florin believed that Waldhart's assignment of shorter runs with more frequent changeovers contributed to her reduced earnings. Respondent's records show that there was no significant difference in the number of changeovers assigned to Florin and those assigned to any of the other quilters. More significantly, the number of changeovers would not have materially affected her earnings under Respondent's compensation system, which balances changeovers against production so as to equalize earnings.[12]

In 1992, Florin was on layoff status for 4 weeks and out on a disability for 1 additional week. Her layoff in the beginning of 1992 was the first she had experienced since she started in quilting in 1986. At least one of the other quilters, Judy Jass, had been out for an extended period of time in 1991, over 11 weeks, due to disabilities and injuries. Jass lost only 1 week in 1992. No other records of time worked by the operators in either 1991 or 1992 were offered.

In mid-February, Respondent combined two needle settings. As a result, a needle setting which Florin considered advantageous was removed from her machine and assigned to one of the 4300 high-speed machines. Following the change, Florin's quarterly average declined by $1.12 and $1.75 per hour in the next two consecutive quarters. Respondent believes that the decrease was occasioned by her lessened effort; that is speculation. What is clear is that the reassignment was motivated by the advantage of running these setups on the fastest machine, a legitimate business justification. There is no contrary contention.

For what it is worth, I note that while Florin's quarterly averages in the first half of 1991 exceeded those of Jass and Markee (the two quilters operating machines equivalent to Florin's), she dropped behind them in the remainder of that year and all of 1992.

Evidence was introduced regarding Florin's vulnerability to being bumped by the more senior operators (particularly Jass) and regarding the start up of the second shift in 1992. These factors may have had some small effect on her earnings but are too negligible to explain the substantial decrease she suffered. There was no evidence that Waldhart encouraged more senior employees to bump Florin.

Based on the foregoing, I am compelled to conclude that Florin's earnings decreased primarily because of her layoffs and time lost to a disability along with the decrease in her quarterly averages. The earnings of Jass and Markee appear to have increased due to the improvements in their quarterly averages; Jass apparently benefited from losing less time in 1992 than she did in 1991.

5. Other alleged discriminatory conduct

The complaints, as amended, alleged discrimination by harassment and close scrutiny of Florin's work in addition to allegations of a discriminatory layoff and discriminatory warnings and reprimands. In response to Respondent's motion for a more definite statement, General Counsel specified that the harassment and scrutiny issues involved the reassignment of work resulting in decreased earnings, closer monitoring of her work, criticism of routine mistakes and regular checking of scrap, reduced allowances for downtime, failure to train on high-speed machines, changes in priority of work assignments, assignment of work to make layoff more likely, and accusations that she was harassing other employees and encouraging other employees to exercise their seniority over (and bump) her. In his brief, the General Counsel further narrowed the discrimination allegations to her 1992 loss of income, four warnings and reprimands, her December 1992 layoff and, generally, a contention that Respondent had engaged in a discriminatory course of conduct. I will deal with the specific allegations enumerated in the response to Respondent's motion only briefly and to the extent that they have not been alluded to in the foregoing discussion.

The record reveals that Waldhart reviewed everyone's work. Where verbal reprimands were issued, the reprimand form provided for further review of the employee's work. Florin was the first employee told that her work would be

[12] Florin also believed that Waldhart was discriminatorily adding work to her quilt cards, thereby giving her longer runs but fewer changeovers and denying her the changeover bonus. Her contentions are inconsistent. On several occasions, Waldhart rejected Florin's claims for down time for such items as cleaning her machine after a preventative maintenance. The record indicates that he allowed her as much time as was allowed other operators for those items. He also disallowed down time for items which had been included in the incentive standard.

reviewed on a daily basis but she was not the only one. Similarly, the record reflects that the Sherri Thompson, the lead person, checked scrap on a regular basis, sometimes as often as three times in a day. Scrap was a serious enough concern for Respondent to pay a bonus based upon how little scrap the employees could produce. The record contains no evidence that Florin's scrap was checked any more frequently than that produced by anyone else.

When the first high-speed quilter was installed, it was assigned to George Garber, the most senior quilter. The second high-speed quilter was brought into the department in March 1993. It was also assigned by seniority to Bob Anderson. The more senior operators have had some training on them. Markee began to train on it but did not pursue the training. Jass has had some training. Florin has asked Bentley several times if she could train on the high-speed machines and has been told her that she would train when there was time. On one occasion within the month before the hearing, Bentley allowed her some training time when she was out of other work at the end of a day. At the time of the hearing, a less senior employee had been brought into the department with the intention that he would take over Florin's job and she would be given the opportunity to learn the operation of the high-speed quilter.

E. *Analysis and Conclusions*

1. Union and/or protected concerted activity

Both counsel argue at length on the question of whether Florin's role in the ESOP lawsuit was protected concerted activity. While I lean strongly toward the position asserted by the General Counsel,[13] I need not reach that question. Florin had clearly and openly engaged in union activity during the organizational campaign. Just as clearly, the ESOP lawsuit, filed in her name, was a continuation of that union activity. More significantly, it was perceived by the Employer as union activity and it was Simmons, not the ESOP administrators, which reacted to that suit. Repeatedly, Respondent, through Saliture, referred to it as union activity, even describing it as part of the Union's ''continuing effort . . . to drive a wedge between the employees and management at Simmons.'' He identified Florin as being in league with the Union in the filing and maintenance of that civil action. Even if Saliture was mistaken in his belief that it was union activity, that mistaken belief would afford employees protection against whatever discrimination it might engender. *New River Industries*, 299 NLRB 773 fn. 1 (1990); *Herbert F. Darling, Inc.*, 287 NLRB 1356 (1988).

2. Alleged discrimination

The more difficult question here is whether Respondent discriminated against Florin. In answering that question, one must look carefully at what happened and not merely at when it happened. Beyond a doubt, Florin's fortunes at Simmons' Janesville plant declined following her involvement in the organizational campaign and the ESOP lawsuit. She received four warnings, suffered a layoff, and saw her earnings reduced by over $4000 in a year. Were these the result of employer action motivated by her union activity or can that conclusion be reached only by post hoc reasoning.

Jennifer Florin is a courageous woman. She literally put her name, if not her neck, on the line to protest what, at least to those of us who are financially unsophisticated, would appear to be a grievous example of the financial abuses of the roaring eighties. Her reward, however, must come from the satisfaction that some remedy was achieved in settlement of the ESOP action. I am unable to find that her misfortunes at work were the product of unlawful employer motivation.

With respect to the warnings and reprimands, I note first that Florin had received two warnings (in addition to the group warning of June 28, 1991) before she received those alleged to be discriminatory.[14] These warnings were for the same alleged failings for which she was subsequently reprimanded, the quality of her work, her failure to work up to performance levels and her loud, abusive, and potentially insubordinate behavior. I note, too, that her comments in the counseling session which accompanied the August 22, 1991 warning evidence an ongoing personality conflict with her supervisor, Waldhart.

The warnings cited in the complaint, when examined objectively, are neither so disparate from those issued to other employees or so unreasonable as to evidence discrimination. Thus, the December 3, 1991 warning for failing to check her setups resulting in 11 scrapped panels, is not unreasonable in a quality oriented operation. It is also consistent with the warnings given Walquist and Garber on February 6, 19, and 20, 1992, for setups and misruns. The admonition that her work would be reviewed on a daily basis was similarly consistent with Walquist's and Garber's warnings. That she was the first employee to be so advised is insufficient to establish that Waldhart discriminatorily chose to so advise her.

Counsel for the General Counsel accuses Waldhart of seeking an excuse to discipline Florin and seizing on a couple of off days in the week ending December 14 to issue her a warning. He notes that Florin was close to her quarterly average on two of the days discussed and that, for the quarter, her performance actually improved. This contention is wide of the mark. My reading of this warning is that it was directed, primarily, at what Waldhart perceived as an intentional ''milking'' of several work days so as to be paid for a full 8 hours when her work could have been completed in less. The facts cited by Waldhart and not contradicted by Florin would tend to support his conclusion. The warning was not issued for failing to achieve her average production on those days when she came close. To find that Respondent should not have warned her for poor performance on those days when Waldhart suspected that she was ''dogging'' it because her overall performance for the week or the quarter was acceptable would require an impermissible substitution

[13] I.e., that the ESOP suit was a protected activity engaged in for the mutual benefit of the employees and was concerted in that it sought to induce group action, the inclusion of other employees in the class, and to secure group benefits. *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987) (*Prill II*), cert. denied 487 U.S. 1205 (1988).

[14] While it is true that these issued after her involvement in the Union's organizational campaign, they were not alleged as discriminatory (although the first charge was timely with respect to them) and I am not at liberty to find that they were. I note that they came 3 or more months after the election and before the filing of the ESOP lawsuit. There was nothing in their timing which would necessarily indicate discriminatory motivation.

of the trier of fact's judgment for that of the Employer. See *Stamping Specialty Co.*, 294 NLRB 703 (1989). Secondarily, I note that the warning was issued for a refusal to follow Waldhart's directions on December 26; she did not directly dispute his facts regarding that incident.

All that is unique about the January 14, 1992 warning is the length of the explanatory materials. They indicate that Waldhart took great pains to review her work for the subject period. Waldhart acknowledged that he went back and reviewed her work for the week; he also acknowledged exercising caution in dealing with her because of her role in the ESOP lawsuit. I find nothing discriminatory in such conduct.

Florin did not receive another warning until April 29, 1992. She did not dispute the assertions in that warning that she had made mistakes on her setups on April 13 and 15 or that she had failed to rerun a panel destroyed by a cutter malfunction. Neither did she dispute the assertion that she had been verbally warned about such errors in December. This warning is consistent with prior warnings she had been given and with warnings given other employees. Even assuming that Waldhart engaged in a bit of ''overkill'' in citing her for creating 3 inches of scrap on April 15, that was merely one minor aspect of the warning. It would have been highly suspicious had he issued her a warning for that error alone but he did not do so. There is no basis for concluding that the April 29 warning, in and of itself, was discriminatory.

Florin did not receive another warning until March 12, 1993. The 10-month time lapse between warnings is some indication that there was no pattern of seeking out inconsequential incidents and issuing warnings. Further, the warning appears to be the outgrowth of a series of incidents, runins with Walquist, for which Florin had previously been cautioned. This warning was not merely for her use of profane and loud language to her supervisor.[15] As it states, it is primarily for repeatedly ''backlashing'' another employee, and for attempting to assume the managerial prerogative of criticizing employees.[16] Secondarily, it is critical of the mode of her communication with Waldhart. Given the undisputed description of this incident, and earlier conduct for which she had been warned, I can not find that this warning was either so unreasonable or so disparate as to appear discriminatory.

I am unable to find that the warnings issued to Jennifer Florin, whether viewed individually or as a group, were motivated by her union activity. Four warnings issued over a 1-1/2-year period, with no suspensions or termination, and with as much as 10 months between the last two warnings, does not evidence a pattern of discrimination, particularly where the warnings were consistent with prior warnings issued to this and other employees and involved undisputed mistakes and errant behavior.

I am similarly unable to conclude that Florin was discriminatorily selected for layoff in December 1992. Most significant to this conclusion is the fact that, when Respondent decided to lay off a quilter, it had no way of controlling who would be laid off. Any one of the more senior quilters could have volunteered for the layoff; given that it was the Christmas season, it would not have been unforeseen that someone would do so. In fact, Walquist did. Had Florin been willing to work nights, she would have continued working and he would have been laid off. Neither could Respondent have known that Florin would decline to bump the temporary employee in order to remain at work. Granted that the temporary's job was probably less desirable than Florin's quilter position, it was still a paying job and it would not have involved a permanent transfer.

General Counsel points to the lack of other layoffs in the plant at the time of Florin's layoff. In fact, there were two others on layoff and a third person was laid off, albeit briefly, right after she was. Moreover, the history of layoffs in this plant, at least for the last 2 years, has been of layoffs involving only one or two workers. Given this history and Bentley's explanation of why individuals from other departments were not laid off, no evidence of discrimination can be found in the fact that no one else was laid off for any significant period immediately before or after Florin's layoff.

Finally, I must reject the contention that Respondent somehow discriminatorily caused Florin to earn less in 1992 than she did in 1991. There is no evidence of any discriminatory conduct by Respondent which might have caused this decrease. All that has been shown is a temporal connection and a suspicion that ''something is definitely going on.'' This, particularly in light of the absence of any significant evidence of animus, is insufficient to sustain General Counsel's burden of proof under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). There is no evidence of any adverse action taken by the employer which brought about this result and thus no prima facie case. See *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991). Absent a prima facie case, there is no shifting of the burden to require Respondent to explain what happened. Thus, there is no basis for the drawing of any adverse inferences from Respondent's failure to provide an explanation or to proffer documents which might do so.

Moreover, the record would seem to explain much of this decrease. Florin was absent due to layoffs for 4 weeks in 1992; she lost another week due to an injury. It appears that she had no comparable periods of unemployment in 1991. At least one of the other quilters with whom she was being compared, Jass, lost far more time in 1991 than she is likely to have lost in 1992. During 1992, Florin lost certain profitable work (or work which she liked and considered profitable) which was transferred to the high-speed quilter. None of this resulted from any discrimination against her. Finally, and notwithstanding the observation of her leadperson that Florin aggressively sought to earn as much as possible, her warnings and the substantial drop in her quarterly averages for several consecutive quarters would seem to indicate that, intentionally or not, she was not working to her full capacity.

Accordingly, as I am compelled to conclude that General Counsel has failed to put forth a prima facie case of discrimination, I shall recommend that the consolidated complaint be dismissed in its entirety.

[15] If that had been the sole basis for this warning, I would have been inclined to find disparate treatment as other employees have gotten away with similar language and worse.

[16] It is immaterial that her criticisms of Walquist's actions may have been understandable or even correct.

CONCLUSION OF LAW

Respondent has not engaged in the unfair labor practices alleged in the complaint.

On the basis of the foregoing findings of fact and conclusion of law and on the entire record in this proceeding, I issue the following recommended[17]

ORDER

The complaint herein is dismissed in its entirety.

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.